Supreme Court, U.S.
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No. 00-349

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY BRIEF

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ADDITIONAL QUESTION PRESENTED

1. Can the Commonwealth of Virginia assert lack of jurisdiction in this Court when her prior assertion was denied by Virginia's trial court, the Commonwealth never excepted from that ruling, and never appealed that ruling in Virginia's trial and appellate courts?

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PETITIONER'S REPLY BRIEF

The Respondents raise that the alleged failure of the Petitioners to add as party-defendant the Comptroller of Virginia denies this Court jurisdiction. Respondents' argument is untrue. This argument was raised first in the trial court by their demurrer, Appendix H, *infra,* A-2, A-3 (Ground 1 to Count I and Ground 1 to Count II) and the trial court overruled that demurrer. Appendix G, p. 66a and 67a. After the trial court's decision, which was not excepted to by the counsel for the defendants,[1] the Respondents have appealed that ruling. It is now the law of the case and there is no defect in this case based on Respondents' allegation.

Moreover, the Respondents fail to recognize that their obligation to pay Petitioners these wages is not created by the Fair Labor Standards Act, 29 U.S.C. §209, *et seq.* (hereinafter "FLSA") but by express and implied contractual obligations created by Respondents' past statements and practices continuing to the present time. Their practice existed after this Court's decision in *National League of Cities v. Usury,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) and before *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), which confirmed the imposition of the FLSA on states and its instrumentalities. See App. G, pp. 38a-39a. Thus, the source of the right to overtime is created by prior agreements and practices by the Respondents. That right is reinforced by the FLSA which, until this Court's ruling in *Alden v. Maine,* 527 U.S. 706, 119

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[1] *E.g.,* compare Petitioners' counsel's signature with Respondents' counsel's signature, Appendix B to Petition for Certiorari.

S.Ct. 2240, 144 L.Ed.2d 636 (1999), provided direct redress for individuals to courts and additional remedies for failure to pay overtime. Indeed, the FLSA may supplant contrary state interpretation of such terms as "work" when overtime compensation is claimed, but the claim of overtime exists independently of the FLSA as part of the contract for employment between the Petitioners and the Respondent. The right to get paid for these wages is not just a unilateral expectation, but, as the facts will show and as pled by the Petitioners, a contractual right based on established practice and agreement.

The Respondents claim *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000) "directly addressed the issue" of state immunity on contractual claims against it. However, the opposite is true. The Virginia Supreme Court denied the claims of probation officers because, in part, they did not present their claims "in the style of a contract claim or in the manner prescribed for such claims by the statutory scheme and case law they cite for their proposition." *Id.*, 259 Va. at 207, 524 S.E.2d at 877. By this language, *Luzik* provided for Petitioners' claims brought pursuant to contract actions as the Motions for Judgment in these cases are styled as contract claims. See p. 12 and p. 13 to Appendix to Brief in Opposition ("Count I: Breach of Employment Contract" and "Count II: Breach of Contract"). The *Luzik* court reasoned that the probationers did not utilize the waiver of sovereign immunity found in Va. Code §8.01-192. *Id.*, 259 Va. at 207, 524 S.E.2d at 877 but the Petitioners did utilize that procedure and argued in the courts below on that basis. The Respondents now rely on the *dicta* that followed this reasoning which stated section Va. Code §8.01-192 was a specific waiver of immunity ("We will assume, without deciding"). *Luzik*, 259 Va. at 207, 524 S.E.2d at 877. However,

holdings in prior Virginia Supreme Court decisions such as *Wiecking v. Allied Medical Supply*, 239 Va. 548, 391 S.E.2d 259 (1990), state Va. Code §8.01-192 is a general waiver. *Id.*, 239 Va. at 552-3, 391 S.E.2d at 261. Indeed, the statute and its predecessors read as a general waiver since at least 1778. *Id.*

Respondents argue that Petitioners' claims are moot because the process now "urged" on the state agency by the Virginia Attorney General includes FLSA matters in grievances so "there is absolutely no reason" the Respondents' denial of due process in the past should be reviewed by this Court. This argument denies redress for past violations by mere promises of future and partial correction. These are the same Respondents who claimed at every level that Petitioners cannot grieve this deprivation. See, e.g., App. 11 through 12, Brief in Opposition.

The Respondents mislead the Court by splicing different statutory sections together. Brief in Opposition at 15. It is true that issues of grievability are subject to judicial review, but that review is limited to just that topic, Va. Code §2.1-116.06.D, and it is true that the "substance of a grievance is submitted for a full hearing" before a hearing officer. Va. Code §2.1-116.07. However, issues concerning wages are not subject to that full hearing before a hearing officer. Va. Code §2.1-116.06.C. It is precisely because wage issues are not subject to review by a neutral decision maker that Respondents have violated Petitioners' due process rights.

Respondents mislead the Court when their Statement of Jurisdiction claims that due process was not raised in the court below. Preliminarily, it is important to recognize the procedural posture of this case. The Amended

Motions for Judgment claim breaches of contract, the Respondents answered stating those breaches are precluded by the Virginia Personnel Act and then the Petitioners claimed that should the Virginia Personnel Act be interpreted to preclude judicial review under state law, that state law interpretation violated Petitioners' due process rights. This posture is recognized by this Court in granting due process protection. See Petition for Writ of Certiorari at 9. Moreover, Petitioners relied on the due process reasoning of a prior Virginia Supreme Court decision for the waiver of immunity expressed in *Wiecking, supra,* and this argument was recognized by the Respondents. Appendix G, Petition for Certiorari, at 57a, 58a, and 60a. Further, this issue was preserved as an anticipated reply to Respondents' argument in its brief before the Virginia Supreme Court. Appendix I, *infra.*

CONCLUSION

There is no jurisdictional defect which could deny Petitioners' requested relief. The unilateral action by Respondents to cure their past denials of due process for future grievants does not moot Petitioners' claims. Rather, by changing its practices, Respondents admit that their past practices precluded Petitioners' claims under Virginia's personnel laws. The failure to provide any due process protection to Petitioners when Respondents took their earned wages should be redressed by this Court and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX H

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF FAIRFAX

Law. No. L178905

CRAIG SCOTT DOUGALL and other current police officers similarly situated,

Plaintiffs,

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY,

and

COMMONWEALTH OF VIRGINIA, et al.,

Defendants.

DEFENDANTS' DEMURRER AND PLEAS TO THE AMENDED MOTION FOR JUDGMENT

The Rectors and Visitors of the George Mason University ("GMU"), and the Commonwealth of Virginia, by and through the Attorney General of Virginia, as counsel, submit the following Grounds for Demurrer, and Pleas of Sovereign Immunity, the Statute of Frauds, and Improper Joinder and Defendants' Motion to Strike. Responses are listed with the Counts designated in the Amended Motion for Judgment filed September 16, 1999.

Count I – Breach of Employment Contract

GROUNDS FOR DEMURRER

1. The plaintiffs have failed to present this claim to the Comptroller of Virginia, pursuant to Code of Va. 2.1-223.1 and 8.01-192, *et seq.*, the claim has not been disallowed as required by law, and the Comptroller has not been made a party defendant as required by statute.

2. The Virginia Personnel Act is the exclusive remedy for such claims by the plaintiffs, as they are claims of state employees.

3. The plaintiffs fail to state a cause of action for breach of an employment contract, inasmuch as they fail to state:

   a) when the alleged contract was made;

   b) essential terms of the contract, including the amount of the agreed wage ("hourly rate");

   c) which of the material terms of the contract were breached;

   d) how the material terms of the contract were breached;

   e) when such terms were breached; and

   f) the resulting damages.

4. Plaintiffs fail to allege a contract which required the defendants to pay for time worked prior to the work day, time worked after the work day, "roll call", work at home, the 15 minute period before roll call, the 1.5 hours per week attending the police academy, the 15 minutes after the conclusion of a shift, mileage expenses, lunch periods, and other discreeet periods of time, and charges.

PLEAS

5. The action against the Commonwealth of Virginia and GMU (the Rector and Visitors in their official capacity) is barred by the doctrine of state sovereign immunity, the Eleventh Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution.

6. The Statute of Frauds bars the claim, Code 11-2.

7. The plaintiffs are improperly joined as parties plaintiff, having distinct claims.

8. This claim is prohibited because the Court is asked to enforce an illegal collective bargaining contract. See Code §40.1-57.2.

Count II – Breach of Contract

GROUNDS FOR DEMURRER

1. The plaintiffs have failed to present this claim to the Comptroller of Virginia, pursuant to Code of Va. 2.1-223.1 and 8.01-192, *et seq.*, the claim has not been disallowed as required by law, and the Comptroller has not been made a party defendant as required by statute.

2. The Virginia Personnel Act is the exclusive remedy for such claims by the plaintiffs, as they are claims of state employees.

3. The plaintiffs fail to state a cause of action for breach of contract, inasmuch as they fail to state:

   a) when the separate contract was made;

   b) the essential and material terms of the separate contract;

c) the nature of the breach alleged;

d) when the breach occurred; and

e) the damages resulting from the breach alleged.

PLEAS

4. The action against the Commonwealth of Virginia and GMU (the Rector and Visitors in their official capacity) is barred by the doctrine of state sovereign immunity, the Eleventh Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution.

5. The Statute of Frauds bars the claim, Code 11-2.

6. The plaintiffs are improperly joined as parties plaintiff, having distinct claims.

7. The clam is unenforceable as based upon an illegal contract. Va. Code 40.1-57.2.

MOTION TO STRIKE

1. The Court's prior rulings preclude plaintiffs from pursuing an action under the Fair Labor Standards Act and hence defendants move to strike Paragraphs 12, 14, 15, 16 and 18 from the Amended Motion for Judgment, as surplusage.

2. The Court's prior rulings and the absence of an express agreement or statutory provision, preclude an award of "reasonable attorney's fees" as sought in Count I.

3. The Amended Motion for Judgment fails to provide the defendants with fair and reasonable notice as

to the amount claimed by the plaintiffs, denying due process of law.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY

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MEMORANDUM

The Defendants have not noticed for a hearing the foregoing Demurrer, etc. The authorities in support of the pleading will be set out in a supplemental Memorandum which will be filed when the matter is noticed for a hearing.

By: /s/ Sydney E. Rab
Sydney E. Rab
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Demurrer, etc. was faxed, and mailed, first-class, postage prepaid, this 21st day of September, 1999, to John P. McGeehan, Esquire, and George A. Hawkins, Esquire, of McGeehan & Associates, 10615 Judicial Drive, Suite 403, Fairfax, Virginia, 22030.

/s/ Sydney E. Rab
Sydney E. Rab
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APPENDIX I

EXCERPT FROM PETITIONER'S PETITION FOR WRIT FROM SUPREME COURT OF VIRGINIA

* * *

E. To Preclude Judicial Review Deprives the Police Officers of their Property without Due Process

The Police Officers seek judicial review of their contract claims. The University attacked the Police Officers' claims by interposing a demurrer arguing that the VPA is an exclusive remedy. In reply to that demurrer, the Police Officer's asserted that the University's position would impose an unconstitutional taking. The Police Officers' claim is not one of a taking, but of breach of contract, a claim considered well-pled by the court below. Order overruling demurrer, 12/9/99. Thus, the issue of constitutional taking is not raised by direct claim; rather, the issue is raised as a reply to the demurrer raised by the University.[23]

First, there is no clearly established bar in the personnel laws to constitutional claims. *Johnson v. Robinson,* 415 U.S. 361, 367, 94 S.Ct. 1160, 1165 (1974). "Serious constitutional questions" arise when an act is construed to bar judicial review of constitutional claims. *Johnson v. Robinson,* 415 U.S. 361-366-367, 94 S.Ct. 1160, 1165-1166 (1974). The only dismissal is when the constitutional claim is "essentially fictitious", "obviously frivolous" and "obviously without merit." *Hagans v.*

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[23] As a reply, the issue is not one to be raised by amendment to the Motion for Judgment. See Footnote 12, *supra,* and accompanying text.

Levine, 415 U.S. 528, 537, 94 S.Ct. 1372, 1379 (1974); *Buchanen v. City of Chesapeake,* 237 Va. 50, 53, 375 S.E.2d 736 (1989) (Apparently applying the this standard). There is no doubt that the Police Officers' claims have merit, due to the amount sought and because their cause of action is well-pled. Even if a statute such as the VPA could preclude ordinary review, such preclusion must give way when constitutional issues when such issues are involved. *Webster v. Doe,* 486 U.S. 592, 603, 108 S.Ct. 2047, 2053 (1988); *Bowen v. Michigan Academy of Family,* 476 U.S. 667, 670-673, 106 S.Ct. 2133, 2135-2137 (1986). These issues were raised through the defense of precluded judicial review. *Webster, supra* at 2050; *Bowen, supra,* at 2135, not as a part of the complainant's case. *See also City of Amarillo v. Hancock,* 239 S.W.2d 788, 790 (1951) (City personnel ordinance which barred judicial review does not bar such review when constitutional issues involved).

In summary, this Court cannot deprive the circuit's review of the Police Officers' contract claims. To deny them judicial review would permit the Commonwealth's agenty to take labor without compensation.

* * *